

**2001 ENVIRONMENTAL NEGOTIATIONS COMPETITION
CONFIDENTIAL INSTRUCTIONS FOR LLI ATTORNEYS
ROUND 2**

The key statutes under which the DA can proceed -- Fish and Game Code § 5650 and Business and Professions Code § 17200 -- allow for, but do not require, the assessment of very large monetary civil penalties. In using their discretion in assessing penalties in environmental cases, courts apply several factors, which are often enumerated in the statutes themselves. Key among them are the extent of the company's deviation from the statutory or regulatory requirements, and the extent of the actual harm or the potential for harm from the violations. Other factors include the economic benefit to the company from its non-compliance, the willfulness of the company's actions, efforts by the company to comply with the legal requirements, the company's past history of compliance, its ability to pay a substantial penalty, the deterrent effect of the penalty on the company and others in the regulated community, and whether the regulatory agencies had historically acquiesced in the violations (i.e., they knew about the conduct but did nothing).

LLI believes that the primary pollutant was sawdust, and that a jury in this county will not get terribly upset about sawdust released to water, and that any harm to the environment of the pond and creek is in fact the result of the activities of other companies, not of its practices. On the other hand, LLI recognizes that its practices have been sloppy and that its failure to address the sawdust issues at its plant could appear to be the result of indifference if not a negative attitude toward protection of the environment.

LLI will agree to do restoration work on the creek. It does not want to do work on the pond, but could agree to fund a study to determine what it would cost to restore the pond. If necessary, LLI is willing to agree to some contribution to pond restoration, as part the total cost of settlement. LLI believes that the DA's demand for \$1 million in penalties and \$1.375 million for damages and restoration costs cannot be justified on the facts, and would never be awarded by a court or jury in a county where there has never been an environmental enforcement case. LLI believes that the HEA analysis for natural resource damages could be easily attacked. LLI recognizes, however, that it has some real risk that a full scale evaluation of natural resource damages could be very costly and not necessarily reduce the damage estimate.

Faced with the DA's monetary demand, LLI would normally fight in court. Because of the potential for criminal jeopardy, however, LLI needs to resolve the matter. LLI seeks the cheapest solution that will completely resolve the issues in the case. The bottom line for LLI is that it will spend no more than \$1,000,000 total for penalties and damages (in addition to restoration of the creek--which LLI believes it can do itself for approximately \$100,000, and sawdust control measures agreed to earlier). LLI would prefer to pay a lower penalty and spend more money on resource enhancement projects in the greater Hagenville area. While \$1 million is the bottom line, top LLI management would be unhappy if the total was that high.

Finally, LLI requested civil compromise of a criminal case. You should determine if Cal. Rules Professional Code, Rule 5-100 applies to the negotiations.